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**FEB 23 2005**

**OFFICE OF PETITIONS**

In re Application of  
Michael J. Hier et al.  
Application No. 10/711,692  
Filed: September 30, 2004  
Attorney Docket No. MASL-68

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:  
: DECISION DISMISSING  
: PETITION  
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This is a decision on the petition filed December 10, 2004, in response to the Notice of Omitted Items mailed October 26, 2004, requesting that the filing date be changed to coincide with the filing of the instant petition, the preliminary amendment and Figures 3A-3B. The petition is being treated under 37 CFR 1.182.

On September 30, 2004 the application was filed. On October 26, 2004, the Office of Initial Patent Examination (OIPE) mailed a Notice of Omitted Items in a Nonprovisional Application stating that the application had been accorded a filing date of September 30, 2004, but Figures 3A-3B described in the specification appeared to have been omitted from the application. In response, on November 4, 2004, a petition was filed by Attorney William R. Allen and on December the petition was dismissed because while petitioners asserted that Figures 3A-3B were received by the Office on September 30, 2004, the evidence presented was not sufficient to prove that Figures 3A-3B were filed with the application when filed. A decision dismissing the petition was mailed December 6, 2004. The application retained the filing date of September 30, 2004 but without Figures 3A-3B as a part of the original disclosure. A preliminary amendment was filed with the petition filed November 4, 2004 and will be reviewed by the examiner in due course for a determination as to whether it introduces new matter.

The instant petition is filed by Attorney Kevin G. Rooney seeking an even later filing date, the date of the instant petition and submission of a preliminary amendment and Figures 3A-3B.

The petition is **DISMISSED**.

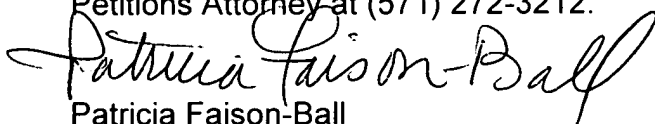
For the purposes of according a filing date, the mailing of a "Notice of Omitted Items" permits the applicant to either: (1) promptly establish prior receipt in the PTO of the omitted item at issue (generally by way of a date-stamped postcard receipt (MPEP 503)), or (2) promptly submit the omitted item in a nonprovisional application and accept the date of such submission as the application filing date. An applicant asserting that the omitted item was in fact deposited in the PTO with the application papers must file a petition (and the appropriate petition fee) with evidence of such deposit. An applicant desiring to submit the omitted item in a nonprovisional application and accept the date of such submission as the application filing date must file any omitted item with an oath or declaration in compliance with 37 CFR 1.63 and 1.64 referring to such item and a petition under 37 CFR 1.182 (with the petition fee under 37 CFR 1.17(h)) requesting the later filing date within two months of the date of the "Notice of Omitted Items" (37 CFR 1.181(f)). Finally, the third option is in the absence of electing options 1) or 2) above, to constructively opt to accept the filing date which has been accorded with the papers filed upon application. With option 3), no petition under 37 CFR 1.182 is necessary for that purpose.

The petition filed November 4, 2004 was filed electing under option (1) and thus while the arguments of prior receipt failed, the decision mailed December 6, 2004 allowed the application to retain the original filing date but without the omitted drawings. Comes now petitioner trying to elect under option (2) to accept the filing date of the submission, however petitioner has done so with a deficient oath or declaration. The oath or declaration submitted upon petition is unsigned and thus not in compliance with 37 CFR 1.63 and 1.64

Again, the application will retain a filing date of September 30, 2004. The copy of Figures 3A-3B supplied with the present petition will not be used for processing or examination. A preliminary amendment is acknowledged and will be reviewed by the examiner in due course.

As the application has already been processed with a filing date of September 30, 2004 and with a notation that Figures 3A-3B were not a part of the original disclosure, this matter will be referred to the Technology Center 3616 for examination in due course and for a review of the preliminary amendment filed November 4, 2004 and December 10, 2004.

Telephone inquiries concerning this matter may be directed to the undersigned  
Petitions Attorney at (571) 272-3212.



Patricia Faison-Ball  
Senior Petitions Attorney  
Office of Petitions